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No. 82-717

IN THE

Supreme Court of the United States

October Term, 1982

TERRACE WEST, INC.,
Petitioner,

against

THE CITY OF PLATTSBURGH, NEW YORK,
Respondent,

and

THE STATE OF NEW YORK,
Intervenor.

ON APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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Question Presented.

Do Articles 2 and 4 of the New York State Eminent Domain Procedure Law (EDPL), which provide that a condemnor shall conduct a public hearing to review the public use to be served by a proposed public project and for judicial review that a determined public use will be served by the proposed acquisition, violate the Due Process Clause of the United States Constitution?

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Statement.

The petition of petitioner for a writ of certiorari contends that Articles 2 and 4 of the New York State Eminent

Domain Procedure Law are unconstitutional and deny petitioner due process under the Fourteenth Amendment of the United States Constitution. It is petitioner's contention that despite the public hearing and judicial review of the Determination and Findings pursuant to EDPL, §201, §203, and §204, there was no impartial hearing before an impartial tribunal or arbitrator and, therefore, it was denied due process. Further, that despite its resort to EDPL, §207, for judicial review by the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, petitioner asserts that such judicial review did not provide adequate due process with respect to whether the proposed taking would serve a public use.

Facts and Prior Proceedings.*

The respondent, City of Plattsburgh, New York, commenced a proceeding under the Eminent Domain Procedure Law (EDPL) of the State of New York to acquire, for use as a public street, a driveway owned by the petitioner, Terrace West, Inc. Following a public hearing, on notice as required by EDPL, the Common Council, the legislative body of the respondent City, made a determination and findings as to the public necessity for the project called Sandra Avenue Improvement Project (A58). Petitioner then sought judicial review of the determination and findings by the Appellate Division of the New York Supreme Court, Third Judicial Department. The Court confirmed, holding that the proposed taking was for a public purpose and dismissed the petition (73 A. D. 2d 763 [3d Dept. 1979]) (A29). Petitioner moved for reargument which was denied (A26). Petitioner appealed to the Court of Appeals of the State of New York. The Court of Appeals dismissed the appeal "upon the ground that no

*References are to pages of petitioner's petition for certiorari.

substantial constitutional question is directly involved" (49 N. Y. 2d 916 [1980]).

Terrace West, Inc., did not seek certiorari to the Supreme Court of the United States, but commenced an action in the United States District Court for the Northern District of New York. That action was dismissed by Judge McCurn in a memorandum decision (A15).

The respondent then commenced a proceeding under Article 4 of EDPL to file its acquisition map and vest title in the City of Plattsburgh, New York. This was granted by Special Term of the New York Supreme Court (A11).

On appeal to the Appellate Division, Third Judicial Department, the order was affirmed (A. D. 2d , 499 N. Y. S. 2d 343) (A8). Permission to appeal to the Court of Appeals was denied on September 8, 1982 (A1).

Constitutional Provisions and Statutes Involved.

United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Eminent Domain Procedure Law:

§201. Public hearings

Except as provided herein, prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed, shall conduct a public hearing in accordance with the provisions of this article at a location reasonably accessible to the property owners whose property might be acquired for such project.

§202. Notice

(A) Where a public hearing is required by this article the condemnor shall give notice to the public of the purpose, time and location of its hearing setting forth the proposed location of the public project including any proposed alternate locations, at least ten but no more than thirty days prior to such public hearing by causing such notice to be published in at least five successive issues of an official daily newspaper if there is one designated in the locality where the project will be situated and in at least five successive issues of a daily newspaper of general circulation in such locality.

(B) In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least two successive issues.

(C) Failure to notify a person or persons entitled to notice under this section shall not be jurisdictional nor construed to affect the validity of any title acquired by a condemnor under this law.

§203. Conduct of the public hearing

At the public hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels. Thereafter, any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project. A record of the hearing shall be kept, including written statements submitted. The condemnor's copy of such record shall be available during normal business hours, at its principal and district offices to the public for examination without cost and shall be reproduced upon written request and payment of the cost thereof. Further adjourned hearings may be scheduled.

§204. Determination and findings

(A) The condemnor, within ninety days after the conclusion of the public hearings held pursuant to this article, shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination and findings in at least two successive issues of an official newspaper if there is one designated in the locality where the project will be situated and in at

least two successive issues of a newspaper of general circulation in such locality. The synopsis shall include those factors set forth in subdivision (B) herein, and shall also state that copies of the determination and findings will be forwarded upon written request without cost.

(B) The condemnor, in its determination and findings, shall specify, but shall not be limited to the following:

(1) the public use, benefit or purpose to be served by the proposed public project;

(2) the approximate location for the proposed public project and the reasons for the selection of that location;

(3) the general effect of the proposed project on the environment and residents of the locality;

(4) such other factors as it considers relevant.

§207. Judicial Review

(A) Any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to this article, may seek judicial review thereof by the appellate division of the supreme court, in the judicial department embracing the county wherein the proposed facility is located by the filing of a petition in such court within thirty days after the condemnor's completion of its publication of its determination and findings pursuant to section two hundred four herein. Such petition shall be accompanied by proof

of service of a demand on the condemnor to file with said court a copy of a written transcript of the record of the proceeding before it, and a copy of its determination and findings. Upon receipt of such petition and demand, the condemnor shall forthwith deliver to the court a copy of the record and a copy of its determination and findings. The proceeding shall be heard on the record without requirement of reproduction. If such proposed public improvement is located in more than one judicial department such proceeding may be brought in any one, but only one of such departments and all such proceedings with relation to any single public project shall be consolidated with the first filed.

(B) The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All such proceedings shall be heard and determined by the appellate division of the supreme court, and by the court of appeals, as expeditiously as possible and with lawful preference over other matters.

(C) The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether:

(1) the proceeding was in conformity with the federal and state constitutions,

(2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,

(3) the condemnor's determination and findings were made in accordance with procedures set forth in this article, including, where applicable, a determination that an acquisition is exempt from compliance with this article, and

(4) a public use will be served by the proposed acquisition.

§402. Filing of acquisition maps; vesting

* * *

(B) In all acquisitions under supreme court jurisdiction provided in subdivision (B) of section five hundred one herein, the condemnor, prior to filing an acquisition map within the time prescribed by section four hundred one, shall obtain an order to acquire such property and for permission to file such map by presentation of a verified petition to the supreme court in the judicial district where the real property to be acquired or any part thereof, is situated, in accordance with the following procedure:

(1) The condemnor shall cause to be filed in the office of the clerk of each county where the real property to be acquired or any part thereof is situated, a notice of the pendency of such proceeding. Such notice shall briefly state the object of the proceeding and shall contain a general description by metes and bounds or by section, block and lot number of the real property to be acquired thereby. It shall also state the names of such of the reputed condemnees of such real property as may

be known to the condemnor, and in case any of the condemnees are unknown, a statement to that effect shall be made in such notice.

(2) The condemnor shall, at least twenty days prior to the return date of the petition, serve by registered or certified mail return receipt requested, a notice of the time, place and object of the proceeding upon the last known owner or owners of record of the property to be acquired, as the same appears from the record of the tax assessor of the district wherein such parcel or parcels are located. Said notice shall contain a copy of that portion of the proposed acquisition map affecting the owner's property. At least ten but not more than thirty days before the return date of the application, the condemnor shall also cause a copy of a diagram or representation of the acquisition map showing the perimeters to be acquired and a notice generally describing the property to be acquired by metes and bounds or by section, block and lot numbers, to be advertised by publishing in at least ten successive issues of an official newspaper if there is one designated in the locality where the property is situated, and in at least ten successive issues of a newspaper of general circulation in such locality. In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least three successive issues. Where the condemnor has conducted an article two public hearing or when the condemnor is exempt from compliance with article two pursuant to section two hundred six the condemnor may dispense with the requirement of publication in ten successive issues of a

newspaper of general circulation. Where practicable, the condemnor shall cause copies of such notice in the form of handbills to be posted for the same period in at least three conspicuous places, upon or near such real property. The inadvertent failure to notify any condemnee, whether of record or not, will not invalidate any proceedings brought hereunder or any title acquired by the condemnor under this law.

(3) The condemnor shall present to the Court a petition verified by an authorized officer of the condemnor setting forth:

(a) a statement providing either the compliance with the requirements of article two of this law, including a copy of the condemnor's determination and findings or a statement providing the basis of exemption from article two;

(b) a copy of the proposed acquisition map to be filed and the names and places of residence of the owners of the property to be acquired;

(c) a description of the real property to be acquired and its location, either by metes and bounds of each individual parcel, or section, block and lot number, and by reference to the acquisition map and notice of pendency attached to the petition;

(d) the public use for which the property is required;

(e) a request that the court direct entry of an order authorizing the filing of the acquisition map

in the office of the appropriate county clerk or register and that upon such filing, title shall vest in the condemnor;

(f) if a non-governmental condemnor subject to the jurisdiction, supervision and regulation of the public service commission or the commissioner of transportation, it shall include in its petition for acquisition, notice that it shall deposit a bond or undertaking with the clerk of the court prior to vesting of title to the real property described in such petition in an amount to be fixed by the court on the return date of the petition. The court shall direct that the bond or undertaking will be applied in the amount necessary, for any default by the condemnor in the payment of all or part of the damages determined in the acquisition proceeding or the abandonment thereof.

The requirement for a bond or undertaking under this subdivision, may be waived by stipulation of the parties. If the amount deposited is insufficient to pay such damages and all costs and expenses awarded to a condemnee, judgment shall be entered against the condemnor for the deficiency, to be enforced and collected in the same manner as a judgment in the supreme court;

(g) if the property is to be used for the construction of a major utility transmission facility, as defined in section one hundred twenty of the public service law, or major steam electric generating facility as defined in section one hundred forty of such law with respect to which a certificate of environmental compatibility and public need has been

issued under such law, a statement that such certificate relating to such property has been issued and is in force.

(4) Upon the presentation of the petition and notice with proof of service thereof, an owner of the property may appear and interpose a verified answer, which must contain specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof, sufficient to form a belief, or a statement of new matter constituting a defense to the proceeding.

(5) At the time and place mentioned in such notice, unless the court shall adjourn the application to a subsequent date, and in that event at the time and place to which the same may be adjourned, upon due proof of service of notice and upon filing of such petition and proof to its satisfaction that the procedural requirements of this law have been met, the court shall direct the immediate filing and entry of the order granting the petition, which order the condemnor shall file and enter together with the acquisition map, in the office of the county clerk or register in each county in which the real property or any part thereof is situated. Upon the filing of the order and the acquisition map, the acquisition of the property in such map shall be complete and title to such property shall then be vested in the condemnor.

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Reasons for Denying the Writ.

The failure of petitioner to seek the writ of certiorari from this Court is adequately referred to in the memorandum decision of Judge McCurn (A19).

It is also respectfully suggested that the present petition for a writ of certiorari does not come within the types of reasons for exercising the Court's discretion to grant review on certiorari as provided in Rule 17 of the Rules of this Court.

Petitioner contends that the New York State Eminent Domain Procedure Law is unconstitutional in that it does not provide for a trial before a court on an adversary type basis of the issue of the necessity for the condemnation.

Petitioner cites no authority to support this contention. On the contrary, it is well settled that the question of need for a taking is for the Legislature and not for the Courts. *Bragg v. Weaver,* 251 U. S. 57; *People v. Adirondack Ry. Co.,* 176 U. S. 335; *Zember v. State of New York,* 5 Misc. 2d 216 (Ct. Cl. 1957).

In *County of Orange v. Public Serv. Comm.,* 39 A. D. 2d 311 (2d Dept. 1972), affd. 31 N. Y. 2d 843 (1973), the Court stated at pages 318-319:

> "It is the general rule that the question of need for a taking is for the Legislature, not the courts; that the courts cannot review the legislative determination on that point, and notice and a hearing on that question consequently are not essential to due process (see, e. g., *Bragg v. Weaver,* 251 U. S. 57, 58-59, 62; *Rindge Co. v. County of Los Angeles,*

262 U. S. 700, 708-709; *People v. Smith*, 21 N. Y. 595, 597-598; *Matter of Townsend*, 39 N. Y. 171, 174; 1 Nichols, Eminent Domain [3d ed.], §4.11, p. 540; 17 Carmody-Wait 2d, New York Practice, §108:13). Generally, it is only on the issues of fair compensation and public use for the taken property that property owners have a constitutional right to be heard, and the right to notice and a hearing on the issue of need for the taking exists only if granted by statute (see, e. g., *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 238-239, affd. *sub nom. Adirondack Ry. Co. v. New York State*, 176 U. S. 335; *Fifth Avenue Coach Lines v. City of New York*, 11 N. Y. 2d 342, 347-348, *Rindge Co. v. County of Los Angeles, supra; Bragg v. Weaver, supra; Matter of Townsend, supra; People v. Smith, supra*). In light of these general principles, then, property owners do not appear to have been deprived of any constitutional right when in 1970 the Legislature took away their previous statutory right to litigate, in the condemnation proceeding, the question of need for a taking for a utility transmission line."

Article 5 of the Eminent Domain Procedure Law provides the right to a full trial in the matter of determining the compensation to which petitioner is entitled.

Articles 2 and 4 of the EDPL do not permit an arbitrary exercise of the power of condemnation and the authority of the State was not exerted in excess of petitioner's right to due process.

CONCLUSION.

For the reasons above stated, the petition for writ of certiorari should be denied.

Dated: Plattsburgh, New York
November 15, 1982

Respectfully submitted,

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